

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF ISSAQUAH**

In the Matter of the Appeal of the)	No. SEP19-00004
)	
Issaquah Environmental Council)	Evergreen Ford and Lincoln
)	SEPA Appeal
)	
Of a SEPA Mitigated Determination)	FINDINGS, CONCLUSIONS,
<u>of Nonsignificance</u>)	AND DECISION

SUMMARY OF DECISION

This appeal involves a challenge to a Mitigated Determination of Nonsignificance (MDNS) issued for a site development permit application associated with the proposed development of a new automotive sales and service facility at 22975 SE 66th Street.¹ The Issaquah Environmental Council (IEC) alleges that the City of Issaquah (City) failed to comply with the State Environmental Policy Act (SEPA) when conducting environmental review of the proposed project and that further environmental review is necessary. Because substantial evidence in the record supports the City's decision to issue the MDNS, the appeal is **DENIED**.

SUMMARY OF PROCEEDINGS

Hearing Date:

The Hearing Examiner convened an open record hearing on the appeal of the Mitigated Determination of Nonsignificance on December 9, 2019. The record was left open until December 30, 2019, to allow the parties to submit closing briefs.²

Testimony:

The following individuals presented testimony under oath at the open record hearing:

Appellant Witnesses:

William Taylor
Connie Marsh

Applicant Witnesses:

Mark Garff
Mike Foster

¹ The appeal of the site development permit (No. SDP19-00001) itself has been decided in a separate decision issued concurrently with this appeal decision, following a consolidated hearing as required by Washington Administrative Code 197-11-680(3)(v) and Issaquah Municipal Code (IMC) 18.04.256.

² IMC 18.04.250 allows the Hearing Examiner 90 days to issue a decision following a SEPA appeal, as occurred here.

Tyrell Bradley
Eric Hansen

City Witnesses:

Greg Johnston
Nell Lund
Katie Cote

Attorney David A. Bricklin represented the Appellant at the appeal hearing.
Attorneys Wright Noel and Stewart Carson represented the Applicant at the appeal hearing.
Attorney Jim Haney represented the City at the appeal hearing.

Exhibits:

The exhibits in Attachment A were admitted into the record. Attachment A also includes a list of pleadings received by the Hearing Examiner related to the MDNS appeal, as well as various orders and pre-hearing decisions produced by the Hearing Examiner in relation to the SEPA appeal.

FINDINGS

Application

1. On March 5, 2019, Evergreen Ford Lincoln (Applicant) submitted a site development permit (SPD) application to construct, in phases, an automotive dealership and service facility, with associated improvements, on a 3.92-acre site. The North Fork of Issaquah Creek (North Fork), a perennial stream with salmonids, crosses the northern edge of the site and an unnamed tributary of the North Fork (Tributary) is located off-site just south of the property, within right-of-way owned by the Washington State Department of Transportation (WSDOT). The Applicant would reduce the 100-foot stream buffer associated with the North Fork by 25 percent, under Issaquah Municipal Code (IMC) 18.10.790, as part of development. As mitigation for the buffer reduction, the Applicant would enhance 19,570 square feet of buffer adjacent to the North Fork. As explained in greater detail below, the City does not consider the Tributary a regulated critical area under the municipal code because it fails to meet the definition of a “stream” under IMC 18.10.390. The property is located at 22975 SE 66th Street.³ *Exhibit C-5; Exhibit C-6; Exhibit C-8.*
2. The currently vacant project site formerly housed a dog kennel and consists primarily of open grassy fields, with a mix of mostly tall deciduous trees growing in groups along the parcel boundaries. In October of 2017, WSDOT completed a realignment of the North Fork through the subject property as part of a fish passage/culvert replacement and habitat improvement project. This created new habitat on the subject property and

³ The property is identified by Tax Assessor Parcel No. 2724069086. *Exhibit C-5.*

reintroduced an additional mile of habitat upstream of the site on the North Fork to native and migratory fish. The realignment project also included realignment of the off-site Tributary. WSDOT planted native trees, shrubs, and groundcover plants above the ordinary high water mark (OHWM) of the North Fork and the Tributary, as part of the realignment project. Some of the mitigation plantings were installed within the WSDOT right-of-way; some were planted on the subject property. *Exhibit C-1.b.*

Initial Technical Review

3. Extensive review of the proposal began shortly after the Applicant submitted its initial project plans. On April 4, 2019, the City's third party environmental consultant, The Watershed Company, prepared a memorandum after reviewing the Applicant's project plans (including a grading plan, stormwater site plan, SDP application, tree plan, and SEPA checklist) and previous materials prepared by WSDOT during its assessment of the North Fork realignment project. Of particular note, The Watershed Company determined that the Applicant should prepare a critical area study (CAS) in support of the proposed buffer reduction and should update its tree plan for consistency with municipal code requirements. *Exhibit C-7.*
4. The Applicant complied with these requests and submitted a CAS, dated April 8, 2019, prepared by O'Neill Service Group (OSG), and a new tree plan, dated April 8, 2019, also prepared by OSG. The CAS provided a detailed analysis of IMC 18.10.790(D), which allows standard stream buffer widths to be "reduced when enhancement of the existing stream buffer vegetation would demonstratively improve water quality and habitat functions." The CAS stressed that, currently, the site consists of compacted earth covered with mowed grass and herbs, a condition that "provides little to no water quality and habitat function." It determined that, with proposed mitigation measures—including enhancing 19,570 square feet of stream buffer adjacent to the North Fork with a mix of native groundcover, shrubs, and tree species typical of the region—the proposal would result in functional lift to water quality, hydrologic function, and habitat function for the North Fork. Specifically, the CAS called for 1,027 plants to be planted within the buffer enhancement area along with placement of at least two pieces of large woody debris. *Exhibit C-8.*
5. The Watershed Company reviewed these additional documents and provided additional comments in a memorandum dated April 18, 2019. The Watershed Company noted that "the proposed mitigation would improve buffer water quality and habitat functions in compliance with IMC 18.10.790(D)(4)(a)" and that the Applicant's plans to plant approximately 19,570 square feet of native vegetation to mitigate for a net buffer loss of 8,512 square feet would result in functional lift of the stream buffer, as required by the municipal code. The Watershed Company made several additional suggestions, including the need for the Applicant to perform a stream delineation of the North Fork to ensure its boundaries are appropriately demarcated, the need for additional information

about the Tributary and whether it would be classified as a “stream” under the City’s critical areas code, and the need for additional information on stormwater and whether stormwater outfalls would impact critical areas. In addition, The Watershed Company suggested that additional trees be planted throughout the entire buffer area and that more large woody debris be provided on-site as part of mitigation efforts. The Watershed Company also suggested additional revisions to the Applicant’s tree plan, to ensure consistency with municipal code requirements. *Exhibit C-10.*

6. On May 16, 2019, the Applicant submitted a “Revised CAS,” prepared by OSG. The Revised CAS incorporated a stream delineation study of the North Fork, as requested by The Watershed Company. In addition, the Revised CAS increased the number of native plants that would be installed in the reduced stream buffer abutting the North Fork from 1,027 to 1,577 and increased the amount of woody debris from two to four pieces, consistent with suggestions from The Watershed Company. On June 4, 2019, The Watershed Company provided a third memorandum assessing the Revised CAS. The memorandum noted that additional information about stormwater facilities should be reviewed to ensure that such facilities do not have permanent buffer impacts, that appropriate fencing and signage should be provided to protect on-site critical areas in perpetuity, and that it would be preferable for the Applicant to install even more large woody debris within the buffer area. *Exhibit C-1.b; Exhibit C-13.*

Initial Review by Rivers and Streams Board

7. The City’s Rivers and Streams Board (Board), which is tasked with “advising the Mayor and City Council of actions necessary” to “protect, preserve, and enhance the water quality in the waterways of Issaquah, and to protect the fish, birds, and mammals that depend upon such aquatic environments,” under IMC 18.03.400, first reviewed the proposal on March 26, 2019. At that time, however, the Applicant had not yet submitted its CAS. Accordingly, the Board reviewed the proposal again on June 4, 2019. Following discussion, including discussion of the Tributary and whether it would meet the definition of a stream under the municipal code, the Board did not resolve whether to recommend approval of the buffer reduction. *Exhibit C-1.f.*

Initial Review by Development Commission

8. The City’s Development Commission (Commission), which has authority to review and approve SDP applications under IMC 18.04.430(B) and .450(A), began review of the proposal on May 1, 2019, at a duly noticed public meeting. At the meeting, several comments were received about environmental impacts from the proposal, including concerns over tree retention and density, and the proposed stream buffer reduction along the North Fork. The meeting was continued to August 21, 2019, to allow for the submission of additional information and public comment. At the continued meeting, several members of the public expressed concern, primarily over an additional topic: whether the Tributary should be protected as a critical area under the municipal code

because it provides habitat for salmonids. City staff conveyed to the Commission that, in its assessment, the Tributary would not be defined as a “stream” under the municipal code (IMC 18.10.390) because it does not receive water from natural sources and, because of this, it would not be regulated as a critical area. Staff noted, however, that additional protection could be provided to the Tributary under the City’s SEPA authority. Ultimately, the Commission unanimously decided to remand the proposal to City staff for further study, including further analysis of issues associated with the Tributary. *Exhibit C-2.*

Additional Technical Review

9. In response to the remand, OSG, along with SCJ Alliance, prepared a memorandum, dated September 11, 2019, assessing the water sources of the Tributary (Water Source Memorandum), on behalf of the Applicant. The Water Source Memorandum specifically focused on whether the Tributary “was draining/conveying water from natural sources or human-built stormwater systems.” Following review of available information from WSDOT (related to the stream realignment) and from the Issaquah Highlands Comprehensive Storm Drainage System Maps, a topographic survey, and multiple field visits, OSG and SCJ Alliance determined that two drainage basins contribute surface water to the Tributary, with approximately 75 percent of stormwater runoff entering the Tributary from human-built stormwater systems serving the Issaquah Highlands development and the remaining 25 percent of stormwater runoff entering the Tributary from portions of Lakeside, Cadman, and the surrounding commercial and industrial developments. The Water Source Memorandum ultimately determined that “the only water sources draining to the Tributary are human-built stormwater systems” and that no “natural sources were identified as draining to the Tributary.” Because of this, the Tributary would not be regulated as a stream under IMC 18.10.390. *Exhibit C-1.c.*
10. OSG prepared an additional memorandum, dated September 25, 2019, assessing the proposal’s “potential direct or indirect impact on the small tributary to the North Fork of Issaquah Creek,” especially in relation to whether the proposal would have a “significant direct or indirect adverse impact on those functions and services that benefit fish and wildlife” (Fish Habitat Memorandum). The Fish Habitat Memorandum stressed that the Tributary “does not meet the definition of a stream under the Issaquah Municipal Code” but, despite this, “is connected to the broader watershed through its surface connection to the North Fork of Issaquah Creek and, along with its riparian buffer, may provide ecological services and functions that benefit fish and wildlife.” The Memorandum addressed water quality functions; enhanced stormwater treatment that would occur on-site, including pollutant infiltration; fine sediment control; attenuated flow rates; the dependability of the proposed stormwater system; shading function; and large woody debris recruitment. Ultimately, the Fish Habitat Memorandum determined that, considering “the limited potential of the Tributary’s buffer,” “the retained native WSDOT plantings that will provide shade and habitat function,” and other mitigating factors,

including the enhanced stormwater treatment that would be provided, the proposal would “have no significant, direct or indirect, adverse impact to environmental functions provided by the Tributary and its riparian buffer.” *Exhibit 1-C.d.*

11. The Watershed Company provided an additional memorandum, dated September 26, 2019, reviewing the Fish Habitat Memorandum. In it, The Watershed Company concurred with the Applicant’s assessment that the Tributary would not be regulated as a stream under IMC 18.10.390; agreed that the Tributary “provides off-channel fish habitat, important for rearing salmonids and as refuge during high-flow events;” and provided an analysis of existing scientific literature related to pollutants, shading, large woody debris recruitment, and the relationship between fish and macroinvertebrates. Ultimately, The Watershed Company determined:

Given existing conditions, water quality functions and shading for temperature are the two primary functions that must be protected to maintain the [Tributary] as viable off-channel rearing and refuge habitat (primarily during the winter and early spring) and avoid downstream impacts to [the North Fork] (such as increased temperature from summer flow events.

Since the stormwater system will be releasing water that has undergone enhanced treatment into a gently-sloped vegetated ‘buffer,’ the narrower width proposed is expected to have a negligible impact [on] existing water quality conditions in the ditch tributary. A negligible impact is barely measurable with no perceptible consequences. This statement presumes dense planting with native trees and shrubs . . . and the addition of groundcovers would also be beneficial.

Presently, shading along the [Tributary] is provided by WSDOT plantings and existing vegetation. Much of the on-site area adjacent to the ditch is emergent weeds and grasses. . . Given existing degraded on-site conditions and the proposed +/- 6.5 foot planting strip along the south property line, the site development is expected to have a minor impact on ditch tributary shading. A minor impact would result in a detectable change, but the change would be localized and small. To ensure the impact is minor, we recommend including native trees in the on-site planting area [adjacent to the Tributary]. As noted for water quality, dense planting with native trees and shrubs is recommended.

Exhibit C-1.e.

SEPA Review

12. The City acted as lead agency and analyzed the environmental impacts of the proposal under the State Environmental Policy Act (SEPA), chapter 43.21C Revised Code of Washington RCW (RCW). Initially, the City issued a proposed Mitigated Determination of Nonsignificance (MDNS) on April 26, 2019, with a comment deadline of May 9, 2019. The proposed MDNS included findings of fact that addressed the CAS, as well as the review memoranda prepared by The Watershed Company (up to that point). It noted that, while the North Fork is a Class 2 fish-bearing stream, the Tributary “is located off the project site and is unregulated by the City of Issaquah.” The proposed MDNS included seven mitigation measures designed to ensure the proposal would not have a probable, significant adverse impact on the environment. These included measures related to protection of the North Fork and to further stormwater review and analysis, and required revisions to and implementation of the Applicant’s proposed mitigation plan (put forth in the CAS). *Exhibit C-11*.
13. At the conclusion of the comment period associated with the proposed MDNS, the City conducted further review of the proposal, including review of the following: comments submitted by the Muckleshoot Tribe concerning the Tributary and the use of it by juvenile salmonids; the Applicant’s Revised CAS; notes from the Rivers and Streams Board meetings, especially on June 4, 2019; updated project plans submitted on July 12, 2019, incorporating greater detail on stormwater management and proposed landscaping; the additional third-party review memorandum prepared by The Watershed Company (dated June 4, 2019) assessing the Revised CAS; and additional project analysis by City staff, including a detailed staff memorandum on SEPA. After reviewing this information, along with the Applicant’s environmental checklist, the City determined that, with mitigation, the proposal would not have a probable significant adverse impact on the environment. Accordingly, the City issued an MDNS on August 14, 2019, with an appeal deadline of September 4, 2019. Required mitigation included measures related to protection of the North Fork and the Tributary, a requirement related to further stormwater review and analysis, and implementation of the Applicant’s proposed mitigation plan (from the Revised CAS). *Exhibit C-16*.
14. On August 22, 2019, prior to expiration of the appeal deadline, the City withdrew its SEPA determination, in light of the remand required by the Commission. Following this, the City allowed additional comments to be submitted, under SEPA, and received and reviewed additional information, including the following: the Water Source Memorandum; the Fish Habitat Memorandum; The Watershed Company’s memorandum reviewing the Fish Habitat Memorandum; a memorandum prepared by City staff, dated September 26, 2019, responding to the Commission’s remand request; an additional memorandum prepared by City staff, dated October 2, 2019, specifically analyzing the project for review under SEPA; additional public comments received at a final meeting of the Rivers and Streams Board on October 1, 2019; and dozens of written comments

submitted to the Rivers and Streams Board, the Commission, and the City. *Exhibit C-3; Exhibit C-5; Exhibit C-19.*

15. On October 2, 2019, the City again determined that, with mitigation, the proposal would not have probable, significant adverse environmental impacts and issued a Revised MDNS for the proposal. Factual findings in the Revised MDNS note: comments from the Muckleshoot Tribe and information prepared by WSDOT indicate that the Tributary is known to contain juvenile salmonids and provides habitat suitable for “forage and rest” for salmonids; the Applicant provided documentation showing the project would not have significant adverse impacts to water quality or shading as it pertains to existing salmon habitat in the Tributary; existing off-site vegetated areas along the Tributary provide water quality, shading, and large woody debris habitat functions; additional on-site vegetated areas provide shading and protect water quality; wildlife habitat along the North Fork would be improved through buffer enhancement; proper location, design, construction and maintenance of the project’s storm drainage facilities is necessary to ensure the protection of water and stream quality; and mitigation measures are necessary to prevent human intrusion and disturbance to the North Fork and Tributary. *Exhibit C-1.*
16. The MDNS included required mitigation measures, including: measures related to the enhancement and protection of the North Fork and the Tributary, including a requirement that the stream and buffer area be “encumbered by a public open space, conversion easement granted to the City of Issaquah, or other open space protection mechanism”; a requirement that any stormwater discharges and/or structures within or draining to critical areas be shown on stormwater plans and quantified and mitigated; and implementation of required mitigation related to reduction of the stream buffer associated with the North Fork (as detailed in the Revised CAS). Of particular note, Condition 1 of the MDNS states:

The purpose and intent of the following conditions are to minimize project-related significant adverse environmental impacts to the adjacent drainage ditch, south of the project site located in the Washington State Department of Transportation (WSDOT) right of way. A portion of the ditch has been designed by WSDOT to provide forage and rest habitat for salmonids entering from the North Fork of Issaquah Creek:

- i. Adjacent onsite planting areas shall be planted with a mixture of native shrubs and trees in order to provide shading and natural water filtration, and groundcover to provide a more structurally complex habitat. If possible, the applicant is encouraged to also add native plants, shrubs, and groundcover in offsite areas adjacent to the ditch owned by WSDOT. Plant densities shall be a minimum of nine feet on center for trees and five feet on center for

shrubs. Planting densities are intended to provide a total number of plants per area – plants should be placed in random, naturalized clusters. Vine maples are considered a shrub and not a tree, so an alternative native tree species must be selected and approved by the City’s consultant during Landscape permit review.

- ii. In order to discourage the intrusion of people or animals, the applicant shall install a 4-foot high split rail wooden fencing along the property line adjacent to the ditch. To prevent vehicle intrusion, wheel stops or similar mechanisms preventing vehicle overhang, shall be installed at the edge of the display areas along the site perimeter near the ditch. These features must be shown on the applicant’s Site Work permit.
- iii. Temporary erosion and sediment control (TESC) measures shall be required for this site according to City codes and standards; however, as an extra precaution to mitigate the proximity of construction activities to fish habitat, a double silt fence shall be installed adjacent to the North Fork of Issaquah Creek and the offsite ditch. The location and extent of the fence will be determined with city staff during the Site Work permit review.

Exhibit C-1.

- 17. The Revised MDNS also noted that a 14-day appeal period would end on October 16, 2019, that the MDNS was being issued in association with the Commission’s decision on the SDP permit, and that “all appeals shall be combined with an appeal of that permit decision, pursuant to IMC 18.04.250.” *Exhibit C-1.*

SDP Decision

- 18. On the same date the Revised MDNS was issued, the Commission concluded its public meeting on the SDP application, granting project approval. On October 9, 2019, the Commission issued its decision. The decision notes that the Commission reviewed the same information City staff reviewed prior to issuing the Revised MDNS (detailed above), including all submitted technical reports and public comments. The Commission decision included approximately 20 conditions that must be adhered to, including compliance with the MDNS mitigation measures and conditions related to tree protection/replacement, landscaping, project timing, the installation of wheel stops adjacent to buffer areas, and design requirements.⁴ The decision stated that a closed record appeal of the decision would be possible and provided for an appeal deadline of October 23, 2019. *Exhibit C-5.*

⁴ The Commission decision includes 35 numbered conditions. Several of these, however, are denoted “[Deleted by staff].” *Exhibit C-5.*

SEPA MDNS Appeal

19. On October 16, 2019, the City received a timely appeal of the MDNS from the Issaquah Environmental Council (IEC, or Appellant). The appeal contends that the SEPA decision was made with missing, partial, or inaccurate information concerning Chinook salmon, the importance of intermittent streams to fish habitat, and the impacts from construction and maintenance of infiltration structures; the proposal did not show how impacts to sensitive areas could have been avoided; environmental impacts concerning stormwater quantities in the Tributary and the North Fork and habitat values were either not described or were inaccurately represented; an Environmental Impact Statement (EIS) should be prepared; and likely take of Chinook salmon, an endangered species, was not addressed.⁵ *Notice of Appeal (MDNS), dated October 16, 2019.*
20. The City transmitted the appeal to the Hearing Examiner, and on October 24, 2019, the Hearing Examiner issued a pre-hearing order setting the open record SEPA appeal hearing for November 19, 2019, and allowing for the submission of pre-hearing motions and briefs. The parties agreed to a revised hearing date, and, accordingly, a revised pre-hearing order was issued on October 30, 2019, setting the hearing for December 9, 2019. *Hearing Examiner's Pre-Hearing Order, dated October 24, 2019; Revised Pre-Hearing Order, dated October 30, 2019.*

Motions and Briefs

21. Following issuance of the revised pre-hearing order, the Hearing Examiner received several motions, including a motion to dismiss the SEPA appeal for lack of standing (submitted by the Applicant) and a motion for summary judgment on the SEPA appeal (also submitted by the Applicant), as well as several motions related to the appeal of the SDP.⁶ In a third revised pre-hearing order, issued November 21, 2019, the Hearing Examiner noted that responses to the dispositive motions would be due by November 25, 2019, as was previously detailed in the second revised pre-hearing order. The Hearing Examiner also noted that, unfortunately, his initial pre-hearing orders mistakenly stated that the consolidated hearing would involve an open record as to both the SEPA appeal and SDP appeal. The Hearing Examiner explained that, as required by IMC 18.04.250(E) and RCW 36.70B.060(6), the portion of the hearing related to the SDP appeal would be on a closed record. In a fourth revised pre-hearing order, also issued on November 21, 2019, the Hearing Examiner noted that the appeal hearing would begin earlier than originally scheduled, at the request of the parties. The parties submitted several additional motions and, on November 29, 2019, the Hearing Examiner issued a

⁵ IEC also timely appealed the Commission's SDP decision on October 23, 2019. As noted above, although a consolidated hearing on the SEPA appeal and the SDP appeal was held, as required by state law and the municipal code, the SDP appeal has been decided in a separate decision issued concurrently with this SEPA appeal decision.

⁶ These motions are separately addressed in the companion decision on the SDP appeal.

fifth revised pre-hearing order. This order clarified that the Hearing Examiner would begin by hearing oral argument on any dispositive motions at the outset of the hearing; followed by hearing the SEPA appeal as an open record hearing, with exhibits, witnesses, and testimony; and concluding with the SDP appeal hearing, with argument on the closed record. The Appellant continued to submit motions and, on December 5, 2019, the Hearing Examiner issued a “Response to Appellant’s Motion for Clarification,” in which procedural matters were clarified, and the Hearing Examiner stressed that no further motions would be considered. *See Attachment A.*

22. The Applicant timely submitted a pre-hearing brief on the SEPA appeal arguing:
- The Appellant has failed to present evidence supporting its contentions that the City issued an MDNS with insufficient information concerning Chinook salmon, the importance of intermittent streams to fish habitat, and the impacts of infiltration structure construction and maintenance. Numerous studies were submitted during the MDNS process that analyzed and addressed the project’s potential impacts on fish, which support the determination that the project, with the required mitigation, would not have an indirect or direct impact on fish. In addition, the project would include a state-of-the-art storm water capture and treatment system that would release water that is both better than the water currently flowing off the site and cleaner than the water in the unnamed Tributary.
 - The Appellant’s contention that the proposal did not show how impacts to sensitive areas could have been avoided applies an incorrect legal standard. The correct legal standard is whether, given required mitigation, the project would have a significant negative impact on the environment. The Appellant lacks any basis for disputing the City’s determination that the MDNS adequately protects the environment from significant negative impacts. Alternatively, the City and the Applicant have worked together to minimize the environmental impact of the project and have planned measures that include shrinking the site footprint as small as feasibly possible, designing more environmentally friendly buildings than required by City code, and planting native landscaping to improve areas outside the project footprint.
 - The Appellant’s contention that the environmental impacts concerning stormwater quantities in the unnamed Tributary and the North Fork and habitat values were either not described or inaccurately represented, is without foundation. The SEPA Checklist, Revised Critical Areas Study, Water Source Memorandum, Fish Habitat Memorandum, and The Watershed Peer Review Letters demonstrate that water from the site would be cleaner and released more slowly than its current pre-development state. In addition, less than 0.5% of the water released into the Tributary would be from the project, and no water from the project would be directly released into the Tributary. All of the stormwater from the project would be captured, treated, and then released through a level spreader on the site before flowing though WSDOT property prior to entering the Tributary.

- An EIS is not required because the City properly determined that an MDNS was appropriate.
- The Appellant has failed to present any evidence that the project would likely result in a taking of Chinook salmon. To the contrary, as a result of the project and required mitigation measures, treated water entering the Tributary would be better than it was pre-development. In addition, the unnamed Tributary is used only for feeding and resting, not spawning.

Applicant's Brief, pages 5 through 8, dated November 25, 2019

23. The City also timely submitted a pre-hearing brief, in which it responded to the Appellant's SEPA MDNS appeal issues as follows:
- The Appellant's contention that the City issued an MDNS with insufficient information concerning Chinook salmon, the importance of intermittent streams to fish habitat, and the impacts of infiltration structure construction and maintenance, is not supported by evidence. In making its threshold SEPA determination, the City considered scientific studies addressing the possible presence of Chinook salmon, a scientific study analyzing impacts of shading along the unnamed Tributary in light of its seasonality, and construction and maintenance impacts.
 - In response to the Appellant's contention that the proposal did not show how impacts to sensitive areas could have been avoided, the City argues that it was not required to show how "impact to sensitive areas could have been avoided" in a SEPA analysis. The City asserts that, although its critical areas regulations require proposals to address "avoiding impacts" as the first step in mitigation sequencing, the critical areas requirements do not apply to the unnamed Tributary. The City also asserts that although the critical-areas regulations apply to the North Fork, the regulations do not require it to duplicate critical-areas analysis in its SEPA review.
 - In response to the Appellant's contention that the environmental impacts concerning stormwater quantities in the unnamed Tributary and the North Fork and habitat values were either not described or inaccurately represented, the City argues that both the O'Neill and Watershed Company studies addressed stormwater quantity, and that it relied on these studies to find stormwater quantity issues insignificant. The City notes that the Applicant's experts determined that impacts from stormwater quantity on the unnamed Tributary were non-significant and that The Watershed Company's review of the Applicant's study identified water quality and shading as the two primary functions of a buffer. The City has no reason to discount the Applicant's expert's findings that stormwater quantity impacts are non-significant and, therefore, it properly inferred that a larger buffer would not meaningfully improve any non-significant stormwater quantity impacts.

- The City correctly determined that the impacts from the project, as mitigated by municipal code requirements and by the recommended conditions, would not have probable significant adverse environmental impacts and, thus, it appropriately declined to require preparation of an EIS.
- In response to the Appellant's contention that the MDNS did not address the likely take of endangered Chinook salmon, the City argues that it appropriately considered potential impacts to Chinook salmon when issuing the MDNS. The City notes that the possible presence of Chinook salmon in the Tributary was noted in The Watershed Company's September 26 memorandum, which it considered when determining that the project would have no probable significant adverse environmental impacts.

City of Issaquah's Pre-Hearing Brief, pages 6 through 8, dated November 25, 2019.

24. The Appellant did not submit an opening brief. It did, however, submit a pre-hearing response brief, in which it argued:
- The Appellant will demonstrate at the open record hearing that the City failed to obtain or consider information regarding the project's impact on riparian zones that support food sources for Chinook salmon and that the City lacked information about the erosion impacts caused by the proposed stormwater collection and discharge system.
 - The Appellant will present testimony at the open record hearing that demonstrates the project would have significant adverse impacts on Chinook salmon habitat and, thus, an EIS is required. Specifically, the project would eliminate a critical food source for Chinook salmon and would likely introduce harmful sediment into the unnamed Tributary. In addition, the City's mitigation measures do not adequately address these adverse impacts to Chinook salmon habitat.

Applicant's Pre-Hearing Response Brief, dated December 3, 2019.

MDNS Open record Appeal Hearing

25. At the outset of the SEPA appeal hearing, the Applicant informed the Hearing Examiner that it was withdrawing its motion to dismiss the SEPA appeal for lack of standing, as well as its summary judgment motion on the MDNS appeal. Accordingly, no further analysis of SEPA-related motions was required prior to the presentation of witness testimony. *Comments of Applicant Attorney.*

Appellant Argument and Witnesses

26. David Bricklin, Attorney for the Appellant, gave an opening statement in which he asserted the evidence would demonstrate that the proposal would have significant environmental impacts that have not been sufficiently mitigated, specifically impacts to fish habitat in the unnamed Tributary. *Argument of Appellant Attorney.*

27. Aquatic Scientist William Taylor testified that he had evaluated the project site, reviewed applicable code provisions, and consulted with colleagues and individuals involved in the WSDOT stream restoration project. He noted that juvenile fish rely on small tributaries, like the unnamed Tributary on the project site, for organic matter and flow conditions to feed and grow. Mr. Taylor explained that WSDOT was required by federal court ruling to replace culverts along the North Fork of the Issaquah Creek. He noted that the culvert restoration efforts have created better flow conditions for fish in the North Fork. Mr. Taylor described the current condition of the project site and explained how living and dead organic material from the riparian area contributes to the natural food web supporting juvenile fish in the Tributary. He stated that paving over grassy areas and removing trees adjacent to the Tributary would significantly impact this food source. Mr. Taylor testified that he had reviewed the riparian habitat assessments prepared by the City's and the Applicant's consultants and determined that the assessments disregarded the project's impacts to food sources for juvenile fish in the Tributary. Mr. Taylor also discussed the proposed use of a level spreader to capture and disperse stormwater runoff to the North Fork and Tributary, noting his opinion that the level spreader could cause erosion that would degrade the food web serving the stream. He opined that the City lacked information sufficient to assess the project's impacts to the Creek and the Tributary when issuing the MDNS. *Testimony of Mr. Taylor.*
28. On cross-examination, Mr. Taylor acknowledged that he did not conduct a hydraulic analysis of the water flow on the site but had inferred the characteristics of water flow on the site based on his observations. He stated that his opinions about the functionality of a level spreader were based on conversations with colleagues in his office and not based on his personal observations or experience. Mr. Taylor acknowledged that he did not perform any sampling on the site to determine its current contribution of insects and macroinvertebrates to the Tributary. He also acknowledged that the site is currently degraded. On redirect, Mr. Taylor noted that the site in its current condition provides habitat functions despite its degraded state. He also noted that, even when a tributary discontinues flowing during the dry summer season, juvenile salmon may reside in small pools that remain. *Testimony of Mr. Taylor.*
29. Connie Marsh testified that restoration and enhancement of salmon passage and habitat is a core value of the Issaquah Environmental Council, of which she is a member. She noted that the WSDOT culvert replacement project has improved salmon habitat function. Ms. Marsh stated her opinion that there has been a steep decline in the return of salmonids to the basin and that greater efforts must be taken to ensure that projects do not further impact salmon habitat. *Testimony of Ms. Marsh.*

*Applicant Witnesses*⁷

30. Landscape Architect Mark Garff testified that he prepared landscapes plan for the Applicant. He noted that the key components for mitigating environmental impacts through landscaping include invasive weed removal, amending the soil, and planting native plants in ground, shrub, and tree layers. Mr. Garff explained that the site currently consists of a grassy field with invasive weeds at the margins that has been heavily compacted over time by the storage of bulk materials and machinery. He stated that the grassy field contains gravel, which is not conducive for growing plants that would support macroinvertebrates. Mr. Garff noted that the landscape plan includes layered plantings designed to support habitat function along the North Fork of the Issaquah Creek. He further noted that, under the landscape plan, soil would be de-compacted and amended with compost and topsoil. Mr. Garff stated that the landscaping would provide better support for macroinvertebrates as compared to the current conditions on the site. He noted that the current landscape plan included plantings near the level spreader that would not impact its functions. Mr. Garff also noted that the MDNS conditions requiring ground cover and tree plantings beyond those specified in the landscaping plans would further support habitat for macroinvertebrates. On cross-examination, Mr. Garff stated that the portion of the site that would be paved for a parking lot currently contains a mixture of grasses and invasive weeds, which he acknowledged could provide habitat for macroinvertebrates. He described some of the project's plans for tree removal and replacement, concluding that, over time, the replacement trees would provide additional habitat value. Mr. Garff acknowledged, however, that the site currently supports vegetation despite its degraded condition. He noted that trees would not be planted along the level spreader to avoid potential damage to the level spreader from tree roots.
- Testimony of Mr. Garff.*

31. Wetland Biologist Mike Foster testified that he prepared the tree retention and replacement plan and critical areas study for the Applicant. He described the current conditions of the site, noting that the interior of the site is compacted and consists of grass and weeds. Mr. Foster stressed that the soil on the site contains gravel with little presence of organic matter and concluded that the grassy area of the site does not provide good habitat for macroinvertebrates. Mr. Foster examined aerial images of the site taken from 2007 through 2018, describing the conditions of the site over time. Mr. Foster explained that stormwater from the proposed parking lot would be collected into detention vaults and run through a filter to reduce pollutants before being discharged. He determined that the treated stormwater would be of a higher quality than that currently flowing off the field, which he noted would benefit fish habitat. Mr. Foster stated his opinion that the project would not result in a decrease of macroinvertebrates because the Applicant's mitigation plan would result in a diverse mix of trees and shrub cover

⁷ Following the conclusion of Ms. Marsh's testimony, the Appellant rested. The City then made a half-time motion for summary judgment, arguing that the Appellant failed to support most of its SEPA appeal issues. The Hearing Examiner denied the motion. *Oral Ruling of the Hearing Examiner.*

beneficial to macroinvertebrates. On cross-examination, Mr. Foster stated that he did not have conversations with the City regarding macroinvertebrates. He acknowledged that the property in its current state provides a source of nutrients to the Creek and the Tributary. *Testimony of Mr. Foster.*

32. Civil Engineer Tyrell Bradley testified that he performed site development services for the Applicant, which included a basin study. He noted that 75 to 80 percent of the water entering the Tributary comes from the Issaquah Highlands development and that the water contains biological matter. Mr. Bradley described the project's proposal to use a modular wetland system, noting that it would exceed minimum requirements for pollutant removal as set forth under the Department of Ecology 2012 Stormwater Management Manual for Western Washington, as amended in 2014. He noted that the modular wetland system would achieve the highest quality of clean water under available systems and would provide the same quality of water as runoff from a predeveloped flat forested area. Mr. Bradley stated that water discharged from the modular wetland system to the Tributary would have less turbidity and would have a lower flow rate than water currently flowing from the site to the Tributary. He stated that he did not have any concerns about erosion from the level spreader because, even if the level spreader settles, it would do so at multiple points and would discharge in the same manner as water currently discharges from the site but at half of the predeveloped flow rate. Mr. Bradley noted that the storm drainage system would meet the Department of Ecology's water quality standards for discharge into fish-bearing bodies of water. He noted that the level spreader would require annual maintenance: removing vegetation and re-drilling weep holes to maintain flow. Mr. Bradley said that it would be unlikely for the level spreader to fail if properly maintained and inspected annually. *Testimony of Mr. Bradley.*
33. Eric Hansen testified that he is a representative of the property owner. He noted that the Applicant's tree planting plan was developed prior to issuance of the MDNS and has not yet been updated because of the appeal. *Testimony of Mr. Hansen.*

City Witnesses

34. Greg Johnston testified that he is a senior fisheries biologist with The Watershed Company and was hired by the City to conduct peer review of the Applicant's proposal. He noted that he had prepared a report for the City that analyzed fish-related issues of the project. Mr. Johnston described the existing condition of the site as having poor soil with sparse vegetation consisting of grass and weeds. He stated that the most important function of the Tributary is for coho salmon habitat during the winter. Mr. Johnston said that he does not have any personal knowledge that the Tributary is used by Chinook salmon and that the North Fork of Issaquah Creek is too small to be an important producer of Chinook salmon. He noted, however, that Chinook salmon are present in the North Fork of Issaquah Creek due to the presence of the Issaquah hatchery. Mr. Johnston stated that he was aware of the possible presence of Chinook salmon in the Tributary

when he analyzed the project's potential impacts to the Tributary, but that he did not view the Tributary as a productive habitat for Chinook salmon. He explained that the primary issues for analyzing potential impacts to fish habitat in the Tributary are water quality and the presence of vegetation, large woody debris, and shading along the banks of the Tributary. He determined that project's impact with respect to pollutants entering the Tributary would be negligible and that the project's impacts with respect to shading and large woody debris would not be significant. Mr. Johnston explained the importance of macroinvertebrates to fish habitat, noting that aquatic macroinvertebrates are a more important food source for fish than terrestrial macroinvertebrates. He stated his opinion that the existing site is not a significant source of detritus or macroinvertebrates for the Tributary. Mr. Johnston determined that the project would not have any significant impact on food sources for fish in the Tributary. On cross-examination, Mr. Johnston acknowledged that Chinook salmon have been spotted in the Tributary but distinguished mere presence of Chinook from use of the Tributary by Chinook. He also discussed the importance of buffer area size in relation to impacts to food sources for fish, noting that buffer areas further from the water produce less food for fish. *Testimony of Mr. Johnston.*

35. Nell Lund testified that she is a senior ecologist and professional wetland scientist at The Watershed Company and was hired by the City to conduct peer review of the Applicant's proposal. She noted that she had reviewed scientific literature on macroinvertebrates, detritus, and fish habitat in preparation for a September 26, 2019, report to the City on the Applicant's proposal. Based on her review of the scientific literature, her report determined that water quality and, to a lesser extent, shading would be the two primary concerns of potential impacts to fish habitat conditions from the proposed development. She did not consider the project's impacts to terrestrial macroinvertebrates to be of great concern because of the degraded condition of the existing site. Ms. Lund stated her opinion that the project would not have a significant impact on macroinvertebrates as a food source for fish in the Tributary. She also noted that better water quality results in a higher abundance of diverse macroinvertebrates. Ms. Lund stated that she had recommended the City impose an MDNS condition requiring planting at a sufficient density and multiple strata to create a complex vegetative buffer, which would provide shading and natural filtration benefiting wildlife habitat. She noted that such planting would also benefit macroinvertebrates. On cross-examination, Ms. Lund testified that vegetation in the upland riparian zone is an important component of the function of the stream macroinvertebrate community. She also testified that the site in its existing degraded condition contributes a food source for fish in the Tributary but would not consider it a substantial contribution. *Testimony of Ms. Lund.*
36. Katie Cote testified that she is a senior planner at BHC Consultants and, in that role, works as an on-call planning consultant to the City. She noted that the City had assigned her to review the project's site development permit and other permits related to the

development. Ms. Cote also noted that she was designated as the SEPA official for the project and issued the MDNS on behalf of the City in that role. She stated that, in deciding whether to issue an MDNS to the Applicant, she had reviewed several documents and considered public comments, comments from the Rivers and Streams Board, comments from the Muckleshoot tribe, as well as discussions with the Applicant and The Watershed Company. Ms. Cote summarized her analysis of the project's potential impacts to the Tributary, stating that, although her initial analysis was focused on potential impacts to the North Fork, itself, and did not focus on impacts to the Tributary, she reviewed the project's potential impacts to the Tributary in more detail after being informed that salmon were observed in it. Ms. Cote stated that, to facilitate a more detailed review of such potential impacts, she had requested that the Applicant prepare an analysis of the existing fish habitat and to prepare a report addressing whether the Tributary would be classified as a stream or a ditch under City code based on the water sources to the Tributary. She also stated that she had requested The Watershed Company to peer review the Applicant's analysis, which informed her decision to issue the MDNS. She noted that her determination that the project would not have an adverse impact on fish habitat in the Tributary did not focus solely on food sources for the fish but, instead, looked at all the factors impacting fish habitat, particularly those factors identified as most important to fish habitat by The Watershed Company, including riparian function and shading. Ms. Cote explained how specific MDNS conditions would mitigate impacts to fish habitat in the Tributary, and she concluded that the project would not have any significant adverse impact on fish habitat. On cross-examination, Ms. Cote testified that MDNS conditions primarily address water quality and shading and that only the first condition addressed potential impacts to the Tributary. She noted that, because the site has a flood plain, the Applicant would be required to obtain a flood plain permit, which may require additional analysis of potential impacts to Chinook habitat. *Testimony of Ms. Cote.*

Closing Briefs

37. Due to time constraints, the parties agreed to submit closing briefs in lieu of oral closing arguments. The parties agreed that the briefs should be submitted by December 19, 2019. *Oral Ruling of the Hearing Examiner.*
38. In its closing brief on the SEPA appeal, the Applicant argues:
 - The Appellant's expert witness, William Taylor, was not qualified to provide an opinion regarding water quality and erosion impacts of the project's proposed level spreader stormwater system. Mr. Taylor admitted that his testimony about level spreaders was based solely on conversations he had with people around the office, and not based on his education, research, or experience. Mr. Taylor also admitted that he had never conducted any hydrological modeling of the site to determine the flow, turbidity, or volume of stormwater entering the Tributary. In contrast, the Applicant's expert witness, Tyrell Bradley, performed a detailed

hydrological analysis of the site and concluded that the proposed system would result in less erosion and turbidity than without the system, benefiting fish habitat. Mr. Bradley testified that, in the unlikely event that the level spreaders fail, flows from the failed level spreader would occur in the same width as currently exists, but at half the flow rate. Moreover, the water flowing from the proposed stormwater system would be purified, and the Applicant's experts and City's peer review experts agree that the project would have a negligible impact on water quality in the Tributary.

- The Appellant's expert witness, William Taylor, lacked foundation to opine about the site's ability to produce macroinvertebrates in its current state. Mr. Taylor did not do any investigation into the site's ability to produce macroinvertebrates, but instead based his opinion on visiting a different off-site field where he had to swipe bugs away from his face. His assertion regarding the site's macroinvertebrate producing qualities lacked any supporting data, and he did not identify what insects would be produced at the site, when they would hatch, or how far they would get into the Tributary. In contrast, Applicant witness Mark Garff testified that the forest near the North Fork of the Issaquah Creek that would be created from the project would provide insects to both the North Fork and the Tributary, that the plantings along the Tributary would be a significant improvement over existing conditions, and that the current site's conditions are comparable to a biological desert for insects. In addition, Applicant witness Mike Foster testified that the only potential significant impact to macroinvertebrates from the project related to its impact on large woody debris recruitment, which helps provide macroinvertebrates. Foster stated that the mitigation efforts of the project would improve food sources to the Tributary. Nell Lund also testified that it is unlikely that bio-nutrients would blow into the Tributary from the field currently on the site because of the weeds and grass that are growing there. Fish biologist Greg Johnston testified that any impact from the project on macroinvertebrates providing a food source to fish in the Tributary would be negligible because nearly all the water in the Tributary comes from other stormwater systems. Mr. Johnston also explained how any macroinvertebrates currently supplied from the site would not likely benefit fish in the Tributary because the macroinvertebrates hatch in the summer, when the Tributary does not have any water.
- The City was fully aware of the issues and possible impacts to fish in the Tributary when it decided to issue an MDNS, and properly concluded that the project, as mitigated, would not have a significant adverse impact on the environment.

Applicant's Post-Hearing SEPA MDNS Brief, dated December 19, 2019.

39. The City filed a closing SEPA MDNS brief, in which it argues:
- The Appellant failed to introduce evidence that there would be significant impacts from erosion as a result of the project's proposed stormwater treatment system, given the Appellant's expert acknowledging that he lacked technical expertise in stormwater treatment. In contrast, the City's stormwater reviewer testified that the project's level spreader would not cause noticeable erosion.
 - The Appellant failed to introduce evidence that the project would significantly decrease macroinvertebrate food supply to fish. The City's consultants performed a site visit to analyze the project's impacts and concluded that terrestrial macroinvertebrates are not an important food source for fish in the Tributary and that the project would not have a significant impact on aquatic macroinvertebrates supplying a food source for the fish. The City properly considered the impact of the project and determined that the project would not have a probable significant adverse impact to the macroinvertebrates supply as a food source for fish in the Tributary.

City of Issaquah's Post-Hearing SEPA MDNS Brief, dated December 19, 2019.

40. In its closing brief on the SEPA appeal, the Appellant argues:
- The City lacked adequate information to assess the project's impacts on organic inputs to the Tributary. The Applicant and the City did not provide any scientific evidence to support the claim that stormwater runoff from Issaquah Highlands would be rich with nutrients, and runoff from streets and paved surfaces is not as apt to provide organic materials as would runoff provided by a field or forest. The Applicant and the City also did not provide any scientific evidence to show that the proposed buffer along the North Fork of Issaquah Creek would provide organic materials to the Tributary.
 - The City lacked adequate information to assess the stormwater erosion impacts on the Tributary. The evidence shows that there is a small space between the proposed 100-foot-long level spreader and the Tributary. The Appellant's expert established that level spreaders can result in erosion either because the level spreader does not remain level and/or water leaving the device forms rivulets that create preferred pathways. This erosion then leads to increased turbidity impacting water quality for salmon.

Appellant's Post-Hearing SEPA MDNS Brief, dated December 19, 2019.

CONCLUSIONS

Jurisdiction

IMC 1.32.020(E) provides that the Hearing Examiner shall affirm the appealed SEPA decision unless, from a review of the record, it is determined the decisions being appealed are clearly erroneous. Moreover, IMC 18.04.250(C) dictates that the SEPA determination of the City's SEPA responsible official shall carry substantial weight in any SEPA appeal.

Appeal Issues to Be Decided

The Hearing Examiner must carefully consider the scope of the appeal when making findings and conclusions to support any decision made in response to an appeal. Those issues identified in an appeal statement that are not pursued during the course of an appeal will be deemed abandoned by the Appellant and not considered further by the Hearing Examiner. *See, e.g., Seattle First-Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 243, 588 P.2d 1308 (1978). A “party abandons an issue by failing to pursue it on appeal by (1) failing to brief the issue or (2) explicitly abandoning the issue at oral argument.” *Holder v. City of Vancouver*, 136 Wn. App. 104, 147 P.3d 641 (2006). Moreover, the Hearing Examiner does not consider issues that are inadequately argued or given only passing treatment on appeal. *See, e.g., State v. Elliot*, 114 Wn.2d 6, 15, 786 P.2d 440 (1990).

In this appeal, the Appellant initially listed five issues in its notice of appeal. As argued in the Appellant’s pre-hearing response brief and elicited by testimony at the open record hearing, however, the Appellant’s appeal issues may appropriately be characterized as follows:

- (1) Whether the City failed to obtain or consider information reasonably sufficient to evaluate the project’s impacts on Chinook salmon, specifically impacts to riparian zones that supply a food source for the Chinook salmon and impacts related to erosion caused by stormwater discharge;
- (2) Whether the required measures set forth in the MDNS were sufficient to mitigate these alleged impacts below the threshold of significance; and
- (3) Whether the alleged impacts compelled the City to require an EIS.

The Hearing Examiner considered these three appeal issues, as characterized above, in making his decision. Other issues raised by the Appellant in its notice of appeal were not argued in briefing by the Appellant and/or no supporting testimony or exhibits were provided at the open record appeal hearing. Accordingly, such issues are deemed abandoned.

Criteria for Review

The State Environmental Policy Act (SEPA), Chapter 43.21C RCW, specifies the environmental review procedures the City must follow for proposals that may have an impact on the environment. “The legislature enacted SEPA in 1971 to inject environmental consciousness into governmental decision-making.” *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn.2d 80, 392 P.3d 1025 (2017). The primary purpose of SEPA is to ensure “that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.” *RCW 43.21C.030(b)*. Every proposal that may impact the environment (unless it is explicitly exempt from SEPA) must undergo some level of environmental review. *RCW 43.21C.030(b)*.

A SEPA threshold determination is a determination of whether a proposal is “likely to have a probable⁸ significant⁹ adverse environmental impact.” WAC 197-11-330. If the City determines that a proposal will not have a probable, significant adverse environmental impact, then a Determination of Nonsignificance (DNS) is issued. If the City determines that a proposal *will* have a probable, significant adverse environmental impact, then a Determination of Significance (DS) is issued and an Environmental Impact Statement (EIS) must be prepared. A Mitigated Determination of Nonsignificance (MDNS) may be issued to mitigate identified probable significant adverse environmental impacts so that an EIS need not be prepared. WAC 197-11-350.

The lead agency must make its threshold determination “based upon information reasonably sufficient to evaluate the environmental impact of a proposal.” If such information is lacking, the lead agency may require additional information from the Applicant, conduct its own study, consult with other agencies, or commit to future environmental review when the project becomes more definite. WAC 197-11-335.

In deciding whether to require an EIS, the lead agency must consider mitigation measures that the agency or Applicant will implement as part of the proposal, including any mitigation measures required by development regulations, comprehensive plans, or other existing environmental rules or laws. WAC 197-11-330(1)(c); WAC 197-11-350.

“SEPA’s primary focus is on the decision-making process” and, as such, “SEPA seeks to ensure that environmental impacts are considered and that decisions to proceed, even those completed with the knowledge of likely adverse environmental impacts, be ‘rational and well-documented.’” *Columbia Riverkeeper*, 188 Wn.2d at 80 (quoting *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 662 P.2d 816 (1983)).

The Hearing Examiner may consider environmental information presented after issuance of the threshold determination in deciding the appeal. The purposes of SEPA are accomplished if the environmental impacts of the proposed development are mitigated below the threshold of significance, even if the mitigation is not identified in the SEPA document. *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001). For the MDNS to survive scrutiny by the Hearing Examiner, the record must demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA and that the decision to issue an MDNS was based on information sufficient to evaluate

⁸ *Probable*, as used in SEPA, means likely or reasonably likely to occur. Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. WAC 197-11-782.

⁹ *Significant*, as used in SEPA, means a reasonable likelihood of more than a moderate adverse impact on environmental policy. Significance involves context and intensity, and does not lend itself to a formula or a quantifiable test. WAC 197-11-794. Several marginal impacts when considered together may result in a significant adverse impact. WAC 197-11-330(3)(c).

the proposal's environmental impact. *Sportsmen v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

Conclusions Based on Findings

Substantial evidence in the record supports the City's decision to issue a Mitigated Determination of Nonsignificance for the proposal. The Hearing Examiner may not stand in the shoes of the City's Responsible Official to make a new, independent SEPA determination. Rather, the Hearing Examiner must give the City's SEPA determination substantial weight. *RCW 43.21C.090*. Here, the City issued its MDNS only after reviewing the Applicant's initial project plans, including a grading plan, stormwater site plan, SDP application, tree plan, and SEPA checklist; an April 4, 2019, memorandum from The Watershed Company that determined the Applicant should prepare a CAS based on its third-party review of the initial project plans; the Applicant's April 8, 2019, CAS and revised tree plan; an April 18, 2019, memorandum from The Watershed Company that provided third-party review of the Applicant's CAS and revised tree plan; the Applicant's May 16, 2019, revised CAS; a June 4, 2019, memorandum from The Watershed Company that provided third-party review of the revised CAS; Rivers and Streams Board meeting minutes; the Applicant's July 12, 2019, updated project plans; the Applicant's September 11, 2019, Water Source Memorandum; the Applicant's September 25, 2019, Fish Habitat Memorandum; a September 26, 2019, memorandum from The Watershed Company that provided third-party review of the Applicant's Fish Habitat Memorandum; and public comments and comments submitted by the Muckleshoot Tribe.

Ultimately, the Appellant focused on two primary issues at the appeal hearing and in its briefing related to SEPA, arguing that the City lacked sufficient information to assess the project's impacts on macroinvertebrates supplying a food source for fish in the Tributary and that the City lacked sufficient information to assess the project's stormwater erosion impacts. At the open record appeal hearing, the Appellant presented the testimony of one expert witness, Aquatic Scientist William Taylor, to support its claims that the City disregarded these impacts. Mr. Taylor testified that organic material from the riparian area of the Tributary contributes to the natural food web supporting juvenile fish in the Tributary and that paving over grassy areas and removing trees would impact this food source. Mr. Taylor also testified that the proposed use of a level spreader to capture and disperse stormwater could cause erosion that would degrade the food web. Mr. Taylor acknowledged on cross-examination that he did not conduct any specific analysis to determine the site's current contribution of macroinvertebrates to the Tributary or to determine the water flow on the site. In contrast, the Applicant and the City presented expert testimony from several expert witnesses that discussed in detail how the project, with conditions, would result in a net benefit to fish habitat in the Tributary, including benefits to macroinvertebrates through buffer plantings, and benefits to water quality through the use of a level spreader stormwater system. Specifically, Senior Fisheries Biologist Greg Johnston of The Watershed Company noted that the current degraded condition of the project site does not provide a significant source of macroinvertebrates for fish in the Tributary and concluded that the project would not have a significant impact on food sources for fish in the Tributary. Senior

Ecologist Nell Lund of The Watershed Company provided similar testimony about the current degraded condition of the project site and concluded that the MDNS condition requiring plantings in the buffer would benefit macroinvertebrates. Regarding potential erosion impacts from the proposed use of level spreader system, Civil Engineer Tyrell Bradley noted that the proposed system would provide the highest quality of clean water under available systems and that he did not have any concerns about the level spreader causing erosion, even if some settling occurs.

In light of the City's extensive review of the Applicant's and the third-party consultant's materials, and in light of expert testimony concluding that the project as conditioned would not adversely affect macroinvertebrates supplying a food source for fish in the Tributary or cause adverse erosion impacts through the use of a level spreader stormwater system, Mr. Taylor's generalized testimony about impacts to macroinvertebrates from paving over grassy areas on the project site and generalized testimony about level spreader erosion impacts was insufficient to find that clear error occurred. Therefore, substantial evidence supports the City's decision and shows that the City did not commit clear error when issuing the MDNS. *Findings 1 – 40.*

DECISION

Because substantial evidence supports the City's decision to issue a MDNS for the proposal, the SEPA appeal is **DENIED**.

DECIDED this 2nd day of March 2020.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center

ATTACHMENT A

Appellant Exhibits:

- A-1. WRIA 8 2017, Lake Washington/Cedar/Sammamish Watershed Chinook Salmon Conservation Plan 10-year Update (excerpts)
- A-2. WA State Department of Ecology stream map
- A-3. WDFW Priority Habitat Map and Species Report
- A-4. WDFW SalmonScape (computer mapping system) excerpt
- A-5. Riparian Ecosystems, Volume 1: Science Synthesis and Management Implications, dated May 2018 (excerpts)
- A-6. Riparian Ecosystems, Volume 2: Management Recommendations, dated May 2018 (excerpts)
- A-7. Overview: Endangered Species Act Compliance for Conditional Letters of Map Change
- A-8. Current/Future Conditions & Source Identification Report Issaquah Creek Basin, dated October 1991 (excerpts)
- A-9. The Quaternary Geology of the Issaquah Basin (1985-1986)
- A-10. IEC Public Comment Letter, dated August 20, 2019
- A-11. FEMA Flood Insurance Rate Map, revised April 19, 2005
- A-12. Declaration of William J. Taylor, dated November 15, 2019
- A-13. William J. Taylor statement of qualifications and technical memorandum, dated November 15, 2019
- A-14. Declaration of Connie Marsh, dated November 18, 2019
- A-15. Exhibits of Connie Marsh:
 - a. Lake Washington/Cedar/Sammamish Watershed Map
 - b. Stream and Chinook distribution Map
 - c. North Fork Issaquah Creek & Unnamed Tributaries WSDOT Fish Passage Improvement Project Report (excerpts)
 - d. Photo History of WSDOT Fish Passage Improvement Project
 - e. City of Issaquah Rivers & Streams Board Minutes, dated June 4, 2019
 - f. Critical Area Review Findings
 - g. Email from Miles Penk to Connie Marsh, June 7, 2019
 - h. IMC 18.10.390 critical areas definition
 - i. Development Commission meetings video links
 - j. Email from Katie Cote to Karen Walter, dated July 11, 2019 with email string
- A-16. Stormwater Site Plan, dated July 2019 (excerpts)
- A-17. CIDDs checklist with staff analysis, dated April 23, 2019
- A-18. Second Declaration of William J. Taylor, dated November 25, 2019, with attached technical memorandum, dated November 22, 2019
- A-19. Declaration of David Kappler, dated November 22, 2019)

Applicant Exhibits:

- B-1. Revised Mitigated Determination of Nonsignificance, dated October 2, 2019 (same as C-1)
- B-2. Notice of Decision, Site Development Permit SDP 19-00001, October 2, 2019 (same as C-5)
- B-3. SEPA Environmental Checklist, submitted March 5, 2019 (same as C-1.a)
- B-4. Critical Areas Study (Revision 01), dated May 16, 2019 (same as C-1.b)
- B-5. Tributary Drainage Basin Review, OSG|O'Neill Service Group, dated September 11, 2019 (same as C-1.c)
- B-6. Environmental Consultation & Peer Review for SEPA, The Watershed Company, dated September 26, 2019 (same as C-1.e)
- B-7. City of Issaquah River & Streams Board minutes, dated March 26, 2019 (same as C.1.f)
- B-8. City of Issaquah River & Streams Board minutes, dated June 4, 2019 (same as C.1.f)
- B-9. Revised SDP Application plan set, SDP Rev "C", dated July 12, 2019 (same as C-1.g)
- B-10. Staff Evaluation for Environmental Checklist, dated September 12, 2019 (same as C-20)
- B-11. Environmental Review, The Watershed Company, dated April 4, 2019 (same as C-7)
- B-12. Environmental Review, The Watershed Company, dated April 18, 2019 (same as C-10)
- B-13. 3rd Environmental Peer Review, The Watershed Company, dated June 4, 2019 (same as C-13)
- B-14. "Are our lawns biological deserts?," *National Science Foundation*, dated July 11, 2018
- B-15. Excerpt from I-90 MP 17.1 North Fork Issaquah Creek – Basis of Design Report, dated December 7, 2016
- B-16. Mitigation Plans (Sheets 1 through 13), dated July 2019
- B-17. Five (5) aerial images of site, dated 2007, 2009, 2010, 2017, and 2018, and three (3) photographs of site, dated October 24, 2018, and April 4, 2019
- B-18. Drainage structure drawings
- B-19. Evaluation of Impact on Tributary, OSG|O'Neill Service Group, dated September 25, 2019 (same as C-1.d)

City Exhibits:

- C-1. Revised Mitigated Determination of Nonsignificance, dated October 2, 2019, (same as B-1), with the following attachments:
 - a. SEPA Environmental Checklist, submitted March 5, 2019 (same as B-3)
 - b. Critical Areas Study (Revision 01), dated May 16, 2019 (same as B-4)
 - c. Tributary Drainage Basin Review, OSG|O'Neill Service Group, dated September 11, 2019 (same as B-5)
 - d. Evaluation of Impact on Tributary, OSG|O'Neill Service Group, dated September 25, 2019 (same as B-19)
 - e. Environmental Consultation & Peer Review for SEPA, The Watershed Company, dated September 26, 2019 (same as B-6)
 - f. City of Issaquah River & Streams Board minutes, dated March 26, 2019; City of Issaquah River & Streams Board minutes, dated June 4, 2019 (same as B-7; B-8)

- g. Revised SDP Application plan set, SDP Rev “C”, dated July 12, 2019 (same as B-9)
- C-2. Memorandum from City staff to Development Commission, dated September 26, 2019
- C-3. Staff Evaluation for Environmental Checklist, dated October 2, 2019
- C-4. Affidavit of Publication, Public Notice, *Issaquah/Sammamish Reporter*, dated October 4, 2019
- C-5. Notice of Decision, Site Development Permit SDP 19-00001, October 2, 2019 (same as B-2)
- C-6. Land Use Application #656810 – Evergreen Ford Lincoln (page 2 of 2), with Site Development Permit Narrative, dated March 5, 2019
- C-7. Environmental Review, The Watershed Company, dated April 4, 2019 (same as B-11)
- C-8. Critical Areas Study, OSG|O’Neill Service Group, dated April 8, 2019
- C-9. Tree Plan, OSG|O’Neill Service Group, dated April 8, 2019
- C-10. Environmental Review, The Watershed Company, dated April 18, 2019 (same as B-12)
- C-11. City of Issaquah Proposed Mitigated Determination of Nonsignificance, dated April 26, 2019
- C-12. City of Issaquah Site Development Permit File No SDP19-00001, Staff Report, dated May 1, 2019
- C-13. 3rd Environmental Peer Review, The Watershed Company, dated June 4, 2019 (same as B-13)
- C-14. SEPA MDNS selected public comments:
 - a. Letter from Jay Regenstreif, Sammamish Plateau Water, to Katie Cote, dated April 29, 2019
 - b. Email from Dave Favour to Katie Cote, dated June 18, 2019, with email string
 - c. Email from Katie Cote to Karen Walter, Muckleshoot Indian Tribe, dated July 11, 2019, with email string
 - d. City of Issaquah Mitigated Determination of Nonsignificance, dated August 14, 2019
- C-15. Staff Evaluation for Environmental Checklist, dated August 14, 2019
- C-16. City of Issaquah Mitigated Determination of Nonsignificance, dated August 14, 2019
- C-17. Memorandum from City staff to Development Commission, dated August 14, 2019 (attachments excluded)
- C-18. Affidavit of Publication, City Notices, *Issaquah/Sammamish Reporter*, Final SEPA MDNS Determination, published August 16, 2019
- C-19. Public Notice of Withdrawal of SEPA Mitigated Determination of Nonsignificance of Proposed Action, for distribution August 22, 2019
- C-20. Staff Evaluation for Environmental Checklist, dated September 12, 2019 (same as B-10)
- C-21. City of Issaquah Proposed Mitigated Determination of Nonsignificance, dated September 12, 2019
- C-22. Issaquah Creek Final Basin and Nonpoint Action Plan, King County Surface Water Management, Washington Department of Ecology, City of Issaquah, Figure 1-2 and Figure 5-7, undated

Appeal, Motions, Pleadings, and Orders:

- Notice of SEPA Appeal, Issaquah Environmental Council, received October 16, 2019
- Hearing Examiner's Pre-Hearing Order, dated October 24, 2019
- Hearing Examiner's Pre-Hearing Order, (*2nd Revised October 30, 2019*)
- Notice of Appearance (David A. Bricklin), dated November 18, 2019
- Issaquah Environmental Council's Motion for Summary Judgment on the issue of the Proper Characterization of the Tributary of the North Fork of Issaquah Creek, dated November 18, 2019; Declaration of William J. Taylor, dated November 15, 2019; Declaration of Connie Marsh, dated November 18, 2019
- Applicant's Motion for Summary Judgment - Site Development (SDP) Appeal, dated November 18, 2019
- Applicant's Motion for Summary Judgment - MDNS Appeal, dated November 18, 2018 [*Withdrawn*]
- Motion to Dismiss Appeals for Lack of Standing, dated November 18, 2019 [*Withdrawn*]
- Hearing Examiner's Pre-Hearing Order (*3rd Revised November 21, 2019*)
- Hearing Examiner's Pre-Hearing Order (*4th Revised November 21, 2019*)
- Issaquah Environmental Council's Motion to Amend Third Prehearing Order, dated November 22, 2019
- Amended Notice of Appearance (Katherine D. Hambley), dated November 22, 2019
- City of Issaquah's Pre-Hearing Brief, dated November 25, 2019
- City of Issaquah's Response to Cross-Motions for Summary Judgment and Applicant's Motion to Dismiss, dated November 25, 2019; Declaration of Katherine Hambley in Support of City's Response to Motions, dated November 25, 2019
- Applicant's Response to IEC's Summary Judgment Motion RE: Characterization of Tributary as Part of the Site Development Permit (SDP) Appeal, dated November 25, 2019
- Applicant's Hearing Brief, dated November 25, 2019
- Issaquah Environmental Council's Response to Motion for Summary Judgment – MDNS Appeal, dated November 25, 2019
- Issaquah Environmental Council's Opposition to Applicant's Motion to Dismiss for Lack of Standing, dated November 25, 2019; Declaration of John MacDuff on Behalf of Issaquah Environmental Council, dated November 22, 2019; Declaration of Connie Marsh, dated November 22, 2019; Declaration of David Kappler, dated November 22, 2019; Declaration of Janet Wall, dated November 22, 2019; Second Declaration of William J. Taylor, dated November 25, 2019
- Applicant's Response to IEC's Motion to Amend Third Pre-Hearing Order, received November 27, 2019
- Issaquah Environmental Council's Motion to Strike and Response to Waiver Argument, dated November 27, 2019
- Stipulation Regarding Designation of SDP Record, dated November 27, 2019

Findings, Conclusions, and Decision

City of Issaquah Hearing Examiner

Issaquah Environmental Council SEPA Appeal

No. SEP19-00004

- Hearing Examiner's Order on Motions and revised Pre-Hearing Order (*5th Revised November 29, 2019*)
- Issaquah Environmental Council's Reply RE Open Record Hearing, dated November 29, 2019
- Hearing Examiner's Response to Appellant's Request for Reconsideration, dated December 3, 2019
- Appellant's Witness and Exhibit List, dated December 3, 2019
- Issaquah Environmental Council's Pre-Hearing Response Brief, dated December 3, 2019
- Issaquah Environmental Council's Motion for Clarification of Order on Motions and Revised Prehearing Order (November 29, 2019), dated October 4, 2019
- Appellant's Amended Exhibit List, dated December 4, 2019
- Hearing Examiner's Response to Appellant's Motion for Clarification, dated December 5, 2019
- Issaquah Environmental Council's Post-Hearing SEPA Brief, dated December 19, 2019
- Applicant's Final Submission Regarding MDNS Post-Hearing Brief, dated December 19, 2019
- City of Issaquah's Post-Hearing Brief on SEPA MDNS Issues, dated December 19, 2019
- Hearing Examiner's Update on Decision, dated February 21, 2020